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Henkel Corporation
One Henkel Way
Rocky Hill, CT 06067

EXAMINER
NICHOLS II, ROBERT K

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rhpatentmail@henkel.com
trish.russo@henkel.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DAVID J. GIBSON and GEOFFREY F. SEYMOUR

Appeal 2015-002035
Application 11/994,869
Technology Center 3700

Before BRETT C. MARTIN, THOMAS F. SMEGAL, and PAUL J. KORNICZKY, *Administrative Patent Judges*.

KORNICZKY, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants, David J. Gibson et al.,[1] appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1–21, 26, and 27.[2] We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

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[1] Appellants identify Henkel IP & Holding, GmbH as the real party in interest. Appeal Br. 2.

[2] Claims 22–25 are cancelled. Appeal Br. 24 (Claims App.).

THE CLAIMED SUBJECT MATTER

The claims are directed to "a container for holding and dispensing a curable product." Spec. 1:6–7. Claims 1, 3, and 20 are the independent claims. Claim 1, reproduced below, is illustrative of the claimed subject matter:

> 1. A container suitable for dispensing dispensable curable products comprising:
>
> a container body which forms an internal reservoir for holding the product;
>
> a dispensing aperture provided in the container body; and the container body comprising, a base, opposing front and rear walls on the base and resiliently deformable opposing side walls which bias said front and rear walls apart, each side wall intermediate the front and rear walls and on the base, each of the front, rear and side walls having a respective top opposite the base, a neck containing the dispensing aperture, and a tapered shoulder portion connecting the neck with respective tops of the front, rear and side walls, and the container body being squeezable to allow dispensing of the product through the aperture;
>
> each side wall having a sigmoidal or sinuous curved profile along its path between the front and rear walls, the sigmoidal or sinuous curved profile including first and second convex lobe portions adjacent the front and rear walls, respectively, and a concave dished portion intermediate the first and second convex lobe portions,
>
> which curved profile is arranged to provide a substantially linear relationship between the compressive force required to move at least one of the front and rear walls toward the other and the distance compressed, within a compressive dispensing range of movement of said at least one of the front and rear walls, so that a yield point is not reached, and
>
> at least that part of the reservoir which is to hold the product has a substantially consistent wall thickness.

REFERENCES

In rejecting the claims on appeal, the Examiner relied upon the following prior art:

Vuillemenot	US 2,571,504	Oct. 16, 1951
Stahmer	US 3,395,836	Aug. 6, 1968
Yamamoto	US 5,156,303	Oct. 20, 1992
InDelicato	US 5,357,985	Oct. 25, 1994
Kohn	US 5,819,991	Oct. 13, 1998
Kasboske	US 6,170,712 B1	Jan. 9, 2001

REJECTIONS

The Examiner made the following rejections:

1. Claims 1–10, 12–17, 20, 26, and 27 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Vuillemenot, Stahmer, and Kasboske.

2. Claim 11 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Vuillemenot, Stahmer, Kasboske, and Kohn.

3. Claim 25 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Vuillemenot, Stahmer, Kasboske, and Yamamoto.

4. Claims 18, 19, and 21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Vuillemenot, Stahmer, Kasboske, and InDelicato.

5. Claims 26 and 27 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite.

Appellants seek our review of these rejections.

ANALYSIS

The Rejections of Claims 1–21, 26, and 27 as Being Unpatentable

Independent claims 1 and 20 recite, in part, side walls having a "curved profile [] arranged to provide a substantially linear relationship

between the compressive force required to move at least one of the front and rear walls toward the other and the distance compressed, within a compressive dispensing range of movement of said at least one of the front and rear walls, so that a yield point is not reached." Independent claim 3 recites, in part, a "container having a compressibility profile of curvature or thickness, evidenced in that the ratio of the force required to compress the container by moving at least one of the front and rear walls toward the other to the amount of compression achieved remains relatively constant." The Examiner and Appellants disagree about whether Vuillemenot discloses these disputed claim limitations.

The Examiner finds that column 2, lines 20–28 of Vuillemenot discloses the disputed limitations in claims 1, 3, and 20:

> When a force is applied to the front and back walls 15 and 16 toward the interior of the bottle, as by squeezing these walls between the thumb and fingers, the accordion pleats flex readily and deform to decrease the interior volume of the bottle, and when the pressure is released the walls readily return to their normal position and the bottle reverts to its normal volume.

See Final Act. 4–5 (claims 1 and 3), 7 (claim 20). Referring to the claim 1 limitation, the Examiner asserts that "Vuillemenot discloses the side walls being resiliently deformable opposing side walls which bias themselves apart (col. 2, lines 26-28), thus, as the distance of compression increases, the force required to continue compression will tend to increase in a substantially linear fashion due to the resistance (or return force) of the form-regaining plastic." Ans. 13; *see also id.* at 14–15 (arguing that Stahmer and Kasboske disclose the claim 1 limitation). Referring to the claim 3 limitation, the Examiner further states that "as the distance of compression increases, the force required to continue compression will

tend[] to increase in a substantially linear fashion due to the resistance (or return force) of the form-regaining plastic itself." *Id.* at 4–5 (citing to Vuillemenot 2:20–28); *see also* Ans. 16–17.

In response to the Examiner's findings, Appellants argue, with respect to claim 1, that Vuillemenot discloses "a force which returns the bottle to its normal volume after having been squeezed. What is not disclosed nor suggested, however, is that Vuillemenot provides 'a substantially linear relationship between the compressive force required to move at least one of the front and rear walls toward the other and the distance compressed.'" Appeal Br. 7; *see also* Reply Br. 1–2. Appellants argue, with respect to claim 3, that Vuillemenot does not disclose any "particular ratio of force to compression." Appeal Br. at 10; *see also id.* at 12 (arguing the cited prior art is silent about "a particular relationship between a given recited dispensing force and a given measured displacement of the side wall of the container").

Applicants are correct. Vuillemenot discloses that a resilient force will return a bottle to its original shape after having been squeezed, but is silent about the disputed limitations. With respect to the disputed limitation in claims 1 and 20, for example, the Examiner does not identify any explicit or inherent disclosure in Vuillemenot relating to (1) the amount of compressive force required to move the bottle's walls towards each other, (2) the distance that the walls are compressed, (3) the existence of any relationship between the compressive force and distance compressed, (4) whether this relationship is substantially linear, or (5) the existence of a "yield point." Similarly, with respect to the disputed limitation in claim 3, the Examiner does not identify any explicit or inherent disclosure in

Vuillemenot relating to (1) the amount of force required to compress the container's walls towards each other, (2) the amount of compression achieved between the container walls, or (3) whether the ratio between these two factors is relatively constant. The Examiner's findings regarding the disputed limitations in claims 1, 3, and 20 are conclusory, unsupported, and merely repeat the language in the claims.

The Examiner does not find that the other cited prior art — Stahmer, Kasboske, Kohn, InDelicato, or Yamamoto — cure the deficiencies of Vuillemenot. Thus, the rejections of independent claims 1, 3, and 20, and those claims which depend from claims 1, 3, and 20, cannot be sustained.

The Rejections of Claims 26 and 27 as Being Indefinite

Claims 26 and 27 recite, in part, "wherein the first and second convex lobe portions and the concave dish portion [are] each defined by a substantially equal radius of curvature." The Examiner determines that these claims are indefinite because the Specification "is silent to the teaching of the second convex lobe portions and the concave dish portion having an equal radius of curvature" and "what range of activity is covered by the term 'substantially.'" Final Act. 2–3.

Appellants assert that support for claims 26 and 27 may be found in the Specification at page 5, line 14 through page 6, line 2; page 13, line 31 through page 14, line 15; and in Figures 5, 8, 9, and 12. Appeal Br. 6. Neither these portions of the Specification nor any other portion of the Specification, however, (1) discloses a definition of radius, (2) explicitly discusses the radii of the convex lobe portions and concave dish portion, (3) discusses any method to calculate the radii, or (4) discloses that the radii are

substantially equal. An ordinary meaning of "radius" is "a line segment extending from the center of a circle or sphere to the circumference or bounding surface." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/radius (last visited January 25, 2017). Thus, a non-circular curved surface does not have *one* radius.

At page 5, line 31 through page 6, line 2, the Specification discloses that the radius of front and rear walls 61, 62 may have a radius of about 40 mm or greater; in which case, walls 61, 62 form a curved surface. As front and rear walls 61, 62 transition into convex lobe portions 80, and as convex lobe portions 80 transition into concave dished portion 81, multiple non-circular/non-spherical surfaces are formed. Because the Specification does not disclose where each surface begins and ends and how to determine the radii of these non-circular surfaces, the Examiner correctly determines that claims 26 and 27 are indefinite. The rejection of claims 26 and 27 is sustained.

DECISION

For the above reasons, the Examiner's rejections of claims 1–21, 26, and 27 under 35 U.S.C. § 103(a) are REVERSED.

The Examiner's rejection of claims 26 and 27 under 35 U.S.C. § 112, second paragraph, is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART